85-1960

Supreme Court, U.S.
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No. 85-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALBERT D. DURDEN

PETITIONER

V.

OFFICE OF PERSONNEL MANAGEMENT

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALBERT D. DURDEN
(PETITIONER PRO SE)
1840 SHAVER ROAD
COOL, CA 95614
(916) 823-2480

QUESTIONS PRESENTED

I. Does a person have a right to know the charges against him and the accuser, when he is accused of Criminal Acts, before Action is taken, regarding the charges, by the Office of Personnel Management?

II. Does OPM have the Authority to make non-factual recovery decisions in a disability case and then shift the burden of proof to the annuitant without first being required to justify the original decision, when the validity of that decision is challenged by factual evidence that shows an error going to the heart of the original decision?

III. Does false testimony by an OPM witness at a MSPB hearing constitute just cause to review the decision based on that testimony?

IV. Does OPM or MSPB have the Authority to apply current regulations in a retro-active manner which results in forfeiture of benefits earned and determined by past laws?

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In The

Supreme Court of the United States

October Term, 1985

No. 85-

Albert D. Durden

Petitioner

v.

Office of Personnel Management

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Petitioner, Albert D. Durden, hereby Petitions this Court to issue a writ

of certiorari to the United States Court of Appeals for the Federal Circuit to review the decision in Albert D. Durden v. OPM, Appeal No. 85-639, decided October 1, 1985 and the denial of rehearing dated March 4, 1986. The Mandate of Judgment was issued on March 19, 1986.

ADMINISTRATIVE DECISIONS BELOW

MSPB decision #SF 831L8410337, dated May 17, 1984 and the denial of review dated July 27, 1984.

OPM decision dated September 16, 1983 and the reconsideration decision dated December 13, 1983.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Federal Circuit were issued and entered on October 1, 1985. The order denying rehearing was dated March 4, 1986. The judgment was issued as a mandate on March 19,

1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S.C.A. Constitution, Article I, Section 9, Clause 3

> "No Bill of Attainder or ex Post facto law shall be passed."

U.S.C.A. Constitution, Article I, Section 9, Clause 3, Note 7

> Ex post facto - "limitation to crimes, penalties and forfeiture."

U.S.C.A. Constitution, Article I, Section 9, Clause 3, Note 30, Paragraph 2

> "A forfeiture deprives a man of what he previously possessed or at least prevents him from acquiring what he substantially paid for."

5 CFR 831.502(a)

> ""Disabled and disability" mean unable or inability to render useful and efficient service because of disease or injury: (1) in the employee's current position; or (2) in a vacant position in the same agency at the same grade or pay level for which the individual is qualified for reassignment."

5 CFR 831.502(d)(2)

> "Each disability annuitant who is under 60 years of age shall be re-examined annually under the direction of OPM, unless OPM determines that the disability is permanent. OPM may order a medical or other examination at any time to determine the facts relative to the nature and degree of disability of the annuitant. Failure to submit to reexamination shall result in suspension of annuity."

5 CFR 831.502(g)(1)

> "Reinstatement of Annuity. (1) When a recovered disability annuitant is not re-employed in a position in which he/she is subject to civil service retirement coverage and based on the results of a current examination, OPM finds that the disability has recurred, OPM shall reinstate the individual's disability annuity. The right to the reinstated annuity accrues from the date of the medical examination which demonstrated that the disability has recurred."

5 USC 8331(6)

> "Disabled and disability mean totally disabled or total disability respectively for useful and efficient service in the grade or class of position last occupied by the employee or member because of disease or injury not due to vicious

habits, intemperance or willful misconduct on his part within 5 years before becoming so disabled."

5 USC 8337(a)

"Any employee shall be considered to be disabled only if the employee is found by the office of Personnel Management to be unable because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service."

STATEMENT OF THE CASE

A. The Facts

The basis for Federal Jurisdiction in the Court of first instance is found in 5 USC 7703(b)(1) and 28USC 1295(a)(9).

The petitioner, a former aircraft mechanic with the Department of the Air Force at McClellan AFB, California, was found disabled for useful and efficient service in this position by OPM and retired in May of 1978 with a permanent

disability preventing useful service as an aircraft mechanic. This decision was based on the following disabilities: chemical sensitivity to petroleum based chemicals that produced symptoms of dizziness, headache, earache, ringing ears and loss of balance, a compound depressed skull fracture with resulting skull cavity, and a hearing loss. As an aircraft mechanic, the petitioner was exposed to noise, dust, silica, asbestos, fumes, smoke, gases and solvents and found disabled for the position due to the disabling symptoms upon exposure to these environmental factors of the position that presented a danger to himself and fellow workers while working on ladders and scaffolding and around active, armed and hazardous aircraft.

B. OPM Proceedings

OPM investigated the petitioner's case in June-August of 1983 due to a series of anonymous, libelous letters and phone calls to OPM accusing him of fraud, engaging in illegal activities and faking a medical condition.

OPM found the petitioner recovered based on a report by Dr. Joseph Lash who tested the petitioner for allergies to grasses and weeds and dozed off during the consultation.

The petitioner requested reconsideration of OPM's decision and submitted a report and test results by Dr. Zane R. Kime that showed proof of petroleum sensitivity and resulting disability.

OPM reconsidered and affirmed original decision stating that Dr. Lash's opinion carried more weight because he was board certified. Dr. Lash is board certified

in traditional allergy treatment which includes allergies to grasses and weeds but does not include chemical sensitivity. The petitioner has submitted a total of three reports from three doctors that agree on his disability.

C. MSPB Proceedings

The petitioner appealed the OPM decision to MSPB and requested a hearing that was held on March 30, 1984.

At the MSPB hearing, a witness for OPM, Carolee Weber, gave false testimony regarding her knowledge of the petitioner's disability. Ms. Weber testified that she had known the petitioner for about 10 years and had never heard him complain of dizziness. The petitioner complained to Ms. Weber of dizziness due to petroleum fume exposure approximately two weeks before the hearing.

At the MSPB hearing, OPM applied the current rules pertaining to initial disability determination, while the applicant is still an agency employee and qualified for reassignment to this case of alleged recovery and presented a personnel specialist to testify to these current procedures that locate and offer an employee a job of equal pay that he can perform with his disability. The petitioner never received the benefit of this current procedure when he retired or when he was found recovered.

MSPB accepted this procedure and considered it as probative evidence in making the decision.

MSPB affirmed the OPM decision based on the petitioner's failure to carry the burden of proof.

The petitioner requested a review of the decision which was denied.

D. Proceedings in the Court of Appeals

The petitioner then appealed to the United States Court of Appeals for the Federal Circuit pending a Supreme Court decision in Lindahl v. OPM, 105 S.Ct., 1620 (1985).

The Court of Appeals requested a brief on the case and the petitioner submitted a brief containing a great deal of factual evidence due to an unknown decision in the Lindahl case at that time. The brief was filed on November 8, 1984. The Lindahl case was decided on March 20, 1985.

The Appeals Court issued an opinion on October 1, 1985, citing a belief that the petitioner was essentially requesting a factual review of the medical evidence

and that was not without its scope of review.

The petitioner then requested a rehearing, suggesting a rehearing en banc because of the legal and procedural issues of this case that were overlooked due to the majority of medical evidence submitted based on an unknown decision in Lindahl v. OPM that later restricted review to legal and procedural questions.

The request for rehearing was denied on March 4, 1986.

The mandate of judgment was issued on March 19, 1986.

REASONS FOR GRANTING THE WRIT

The United States Court of appeals for the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

This departure created a failure of the Appeals Court to recognize total compliance with the requirements set down by the Supreme Court in Lindahl v. OPM, 105 S. Ct., 1620(1985) that allows the Court of Appeals to review this case. This case involves a substantial departure from important procedural rights, a misconstruction of the governing legislation and similar errors going to the heart of the administrative determination.

I. Criminal Accusations

OPM initiated this case with a substantial departure from important procedural rights by allowing a series of anonymous, libelous letters to create a preconceived notion of guilt and deprived the petitioner of the right to be presumed innocent until proven guilty and the right to know the charges against him and the accuser. The petitioner was accused of

fraud, engaging in illegal activities and faking a medical condition by a so-called anonymous informant. OPM declared the petitioner guilty and set out to prove it. The petitioner was never informed of these criminal charges and discovered the libelous letters by accident after he was investigated and found recovered based on an erroneous medical report. The petitioner should have a right to know the charges against him and the accuser before action is taken by OPM.

U.S. Office of Personnel Management
Civil Service Retirement System
P.O. Box 7815
Washington, D.C. 20044

January 24, 1983

To Whom It May Concern,

On January 5, 1983 Ms. Lucretia F. Myers answered my query regarding a fraudulent recipient of retirement benefits. She told me to supply you with the following information; she also advised me to withhold my name in order to protect my anonymity.

The person who has been receiving undeserved retirement benefits is Mr. Albert Durden. His address is 1840 Shaver Road, Cool, California, and his phone number is (916) 823-2480. I was

unable to secure his social security number without rousing suspicion, but I did learn that his date of birth is October 9, 1942 and that he worked for McClellan Air Force Base in Sacramento, California as a flight line mechanic. Approximately four years ago he faked an allergic condition and retired with undeserved monetary benefits. Around that time he had received a head injury while working on his own property, and used that too, as a reason to retire; the injury has never affected his actions at all. His retirement stated that he was unable to climb any tall buildings or structures since he had claimed that such elevation caused him to be dizzy; unbeknown to the government, he has just finished building a garage at his residence, and frequently does various rooftop jobs on his house. Mr. Durden has no

trouble doing any type of work when it behooves him. His retirement also mandated that he work outside of the Sacramento Valley since he said the pollens in the region adversely affected him; although he has his home outside of the valley, the time he spends in the valley is the same or more than the amount of time he spent there while working. For some "strange reason", he now has no adverse reactions to the pollens in the valley.

Although not currently employed, Mr. Durden works whenever the spirit moves him; when this rarity does occur, he has performed hard manual labor without any type of problem afterwards. He always works for private individuals and does not report the income. I cannot supply you with exact figures of his income as he does not share that information.

For more detailed information, I suggest you contact his friends, Eric and Carolee Weber, P.O. Box 723, Georgetown, California, 95634. I believe their phone
number is (916) 333-1296.

Because of his retirement, Mr Durden has refused to work at a steady job and has, instead, put his wife to work full time. This action has caused her some serious physical problems, and it is because of this that I am reporting his sham. If he were rightfully taken off of the retirement fund, he would be forced to return to work and his wife could quite. As it is, he never intends to work again, and has so stated. I feel that a healthy man who is capable of building a house, a garage, fencing 13 acres, and performing manual labor should not be given retirement benefits which

were secured through fraud. I would suggest that you have a doctor of your own choice examine Mr. Durden, and he would find the man to be sound. Hopefully, Mr. Durden would not be able to "snow" your doctor with his routine of dizziness and weakness again. It is very scary to see how easily a person can unfairly retire and receive benefits with cost of living raises while others in our country are struggling to survive. I shudder to imagine how many other people have done the same as Mr. Durden and are getting away with it just as he is. Hopefully you will be able to rectify his situation soon.

Once again, I suggest that you contact the Webers who I mentioned earlier in this letter. They have known the Durdens for many years and could supply you with better information than I. I

hope that you will investigate this case fully and extensively; I was told by Senator Alan Cranston that younger retirees are supposed to be investigated routinely anyway; Mr. Durden has never been investigated since his retirement, and has assumed that he "got away with it". I am hopeful that you will change his mind.

Sincerely,

Name Withheld

P.S. Mr. Durden's full name is Albert Douglas Durden.

U.S. Office Of Personnel Management
Civil Service Retirement System
P.O. Box 7815
Washington, D.C. 20044

September 27, 1983

To Whom It May Concern,

I was glad to see that you have finally taken action against the fraudulent disability retiree, Albert Durden, Social Security number 573-56-8617. I understand that his undeserved retirement checks will be discontinued in 11 months time. However, I thought you might like to know that he intends to fight your decision and plans to use an old head injury as one of his reasons. Actually that injury in no way curtails his activities, and, just like his supposed allergies, represents merely another ploy to

escape having to rejoin the work force. Mr. Durden claimed that his allergies made it impossible for him to work in above-the-ground levels due to dizziness, and I am sure he will say his head injury (which did not occur while at work) causes the same response. Actually he recently, completely alone, built a two-story two-car barn/garage as well as helped complete a relative's two-story house. Anyone with dizziness problems could hardly do that since both roofs were quite steep and high; Mr. Durden had no problem whatsoever.

In his fight against your decision he may also claim allergies to the Sacramento Valley pollen (his previous federal job was at McClellan Air Force Base in Sacramento). In reality, he is frequently in the Sacramento area on business or

visiting friends and seems to be completely unbothered by the pollen there. He will allege that his "allergies" make it impossible to return to work at McClellan; I think he is just allergic to work.

Since his undeserved retirement several years ago, Mr. Durden has frequently engaged in heavy construction work and other types of hard manual labor without any ill effects; he has never reported his income to your office either.

I hope this information will aid you in your battle with Mr. Durden; if you need sworn statements regarding his activities over the past years I suggest you contact Mr. and Mrs. Eric Weber, P.O. Box 723, Georgetown, California 95634; they have been aware of his activities for around 10 years or so and could

easily fill you in on his illegal activities and faked physical symptoms since his retirement from his federal job.

Name withheld for anonymity

II. PROCEDURAL DEPARTURE AND ERRORS GOING TO THE HEART

OPM is authorized by 5 CFR 831.502(d)(2), to order a medical examination to determine the facts relative to the nature and degree of disability of an annuitant. OPM's recovery decision was based on a medical report by Dr. Joseph Lash, who is untrained and unqualified in the field of chemical sensitivity, the petitioner's disabling condition. Dr. Lash was informed of this sensitivity to petroleum-based chemicals but tested the petitioner for allergies to grasses and weeds. This examination failed to determine any fact relative to the disability, therefore any decision based on this report is anything but factual and in violation of 5 CFR 831.502(d)(2). Dr. Lash also dozed off four or five times during the consultation which makes

determination of fact more difficult. The petitioner has challenged this erroneous report from the beginning but OPM refuses to address the issue of its validity. OPM accepted this report without question because it said what they wanted to hear based on the preconceived notion of guilt. By accepting this erroneous report as proof of recovery, OPM substantially departed from authorized procedure and made an error going to the heart of the decision. It is impossible to determine sensitivity to petroleum chemicals by testing for grass and weed allergies. The petitioner has a right, under 5 CFR 831.502(d)(2), to be examined by a qualified physician with the expertise to determine the facts of his petroleum chemical related disability. The petitioner submitted, at his expense, reports from three doctors that

agree on his disability which is overwhelming evidence and not accepting it as such is a further departure from authorized procedure and an error going to the heart.

In the Appeal to the MSPB, the petitioner challenged OPM's recovery decision based on the erroneous medical report by Dr. Lash which was based on the irrelevant examination and testing for allergies to grasses and weeds. Dr. Lash failed to examine or test the petitioner for sensitivity to petroleum chemicals which is the disabling condition in question. The MSPB failed to address this issue in its review which was the reason for the appeal in the first place.

The failure by MSPB to examine this erroneous procedure resulted in a continuation of unauthorized procedure and a

miscalculation in the weight of the petitioner's evidence.

OPM determined that the petitioner's disability was permanent in 1978 and reexamined him only because of the anonymous letters of lies, that accused him of faking a medical condition.

The determination of a permanent disability by OPM in 1978 was based on the following disabilities that cannot improve: nerve deafness, and a compound depressed skull fracture with resulting hole in skull in addition to dizziness caused by chemical sensitivity to job-related petroleum chemicals.

The petitioner proved that these conditions were disabling for his position in 1978 and he is not required by law to reprove this to OPM. Recovery is based on improvement or alleviation of the

disabilities, which in this case is impossible.

If an annuitant actually recovers and later the same disability recurs, he is not required to prove that the same disability is disabling for the position he last occupied but is only required to show proof that the same disability recurred and OPM is required to reinstate the annuitant's benefits based on a current medical report showing recurrence.

OPM and MSPB forced the petitioner to reprove his disability under the current law which is not within either agency's authority. This improper procedure created an error going to the heart of the MSPB decision.

OPM records indicate that the primary reason for allowance of the petitioner's disability annuity in 1978 was nerve

deafness, Code 901, and other medical conditions, Code 9, considered as contributing to the disability. The primary disability, nerve deafness, is verified by the report and testing performed by Dr. Walter E. Arute at OPM's request but overlooked by OPM due to a preconceived notion of guilt created by the libelous letters.

The nerve deafness cannot improve, the skull hole defect cannot change and the sensitivity to job-related petroleum chemicals is not likely to improve. These permanent conditions formed the basis of OPM's determination in 1978 of a permanent disability. Recovery in this case is impossible. OPM's alleged recovery decision is based on unlawful procedures and prejudgment based on false accusations.

III. FALSE TESTIMONY

A witness for OPM at the MSPB hearing gave false testimony that resulted in erroneous evidence being considered by MSPB that prevented the petitioner from carrying the burden of proof.

The witness is Carolee Weber, who is also the author of the libelous letters and slanderous phone calls to OPM accusing the petitioner of criminal acts.

Ms. Weber testified that she had known the petitioner for ten years and had never heard him complain of dizziness but just two weeks before the hearing the petitioner complained to her of dizziness after being exposed to petroleum fumes.

Eric Weber, Carolee Weber's husband, is aware of the truth and is now willing to testify that Carolee lied at the MSPB hearing and in the anonymous letters that she admitted writing.

This evidence alone warrants a review of this case.

April 6, 1986

I, Eric L. Weber, do solemnly swear that I attended a hearing held on March 30, 1984 for Albert Durden and witnessed Carolee Weber give false testimony regarding Mr. Durden's disability.

Carolee testified that she had never heard Mr. Durden complain of dizziness. This is untrue as she related to me about 2 weeks prior to the hearing that Mr. Durden complained to her about being dizzy from gasoline fumes when driving up to our house. Mr. Durden has complained about dizziness many times throughout our 10+ year friendship.

I also know, through statements made by Carolee, that she wrote the anonymous letters as part of her campaign to stop Mr. Durden's retirement checks. She did this for personal reasons, knowing that her accusations were untrue. Carolee is

a compulsive liar and will say anything to get her way or make a point.

I have been married to Carolee for over 17 years and swear these statements to be true under penalty of perjury. I would be willing to swear to this in a court of law.

Eric L. Weber
P.O. Box 723
Georgetown, CA 95634
Phone (916) 333-1296

IV. MISCONSTRUCTION OF GOVERNING LEGISLATION

The law that applies to this case is 5 USC 8331(6). The OPM reconsideration decision, December 13, 1983, Page 1, Paragraph 1 and 2 and D.C.D. Form 52, dated April, 1983, No. (1)(b) indicate that OPM was using correct guidelines at that time but based the decision on the erroneous report by Dr. Lash.

One issue in question in this case is the application of current law by OPM and MSPB. This issue was raised by OPM at the MSPB hearing held on March 30, 1984. The decision by MSPB was based on current law and precedents and testimony related to current law. MSPB decision #SF831L8410337 dated May 17, 1984, Page 5, last paragraph and Page 6, paragraph 1.

This unauthorized procedure represents a misconstruction of the governing legislation and resulted in preventing the petitioner from carrying the burden of proof. The consideration of irrelevant evidence altered the weight of the petitioner's burden of proof and led to an erroneous decision based on ex post facto law enforcement. The Court of Appeals noted:

> "that the board specifically held that Mr. Durden cannot qualify for disability benefits under either the standard in effect at the time he was first determined disabled or under the current disability standard. Thus, we need not address which standard is appropriate."

This opinion is a far departure from the accepted and usual course of judicial proceedings because the correct standard has to first be applied to a case to assure that only relevant evidence material to the case is considered. Any

decision based on irrelevant law, precedents and testimony is an erroneous decision and not based on the facts of the case. This improper procedure by MSPB created a miscalculation in the weight of the petitioner's evidence and resulted in an erroneous tilt of the scale in OPM's favor.

The petitioner carries the burden of proof if the correct standard is applied.

OPM exceeded its authority and created a misconstruction of the governing legislation by a retroactive misapplication of the current regulations pertaining to initial disability determination to this case of alleged recovery that was decided in 1978 under previous law. This procedure represents ex post facto law enforcement and is forbidden by the United

States Constitution. U.S.C.A. Constitution Article I, Section 9, Clause 3, Note 7 limits ex post facto laws to crimes, penalties and forfeitures. USCA Constitution, Article I, Section 9, Clause 3, Note 30, paragraph 2, states that:

> "A forfeiture deprives a man of what he previously possessed or at least prevents him from acquiring what he substantially paid for."

The application of current law by OPM in this case resulted in petitioner being penalized by forcing him to forfeit his benefits that he previously possessed and substantially paid for through contributions and dedicated service.

In the cases of Hiss v. Hampton D.C.D.C., 1972, 338F Supp. 1141 and Burello v. Com. State Emp. Ret. System, 1980, 411A, 2nd 852, 49 Pa Commonwealth 364, the courts ruled that a retroactive act or regulation that denies or causes

forfeiture of benefits is a violation of constitutional provisions against ex post facto laws.

The decision in Parodi v. MSPB, CA.9, 1982, 690 F.2d, 731 illustrates the requirements in the current initial procedure and requires that a person be offered a suitable position and if not, the person is eligible for benefits.

MSPB exceeded its authority by allowing OPM to apply these ex post facto laws and by considering the current law pertaining to accommodation and reassignment in making its decision. The law in effect when the petitioner retired, 5 USC 8331(6), required that a person be disabled for useful and efficient service in the position last occupied only. The current law, 5 USC 8337(a) and 5 CFR 831.502(a) requires consideration of vacant positions in the same agency, at

the same grade or pay level for which the individual is qualified for reassignment. These regulations and criteria are used to determine initial disability eligibility and does not pertain to a case of recovery that was decided in 1978. The petitioner did not receive the benefits of this current procedure when he retired or when he was found recovered. OPM applied only the portion of the current law that supported its decision and excluded the portion that would have benefitted the petitioner by locating and offering him a job of equal pay that he could perform with his disability.

The petitioner was forced to carry the burden of proof by a preponderance of the evidence. By considering misapplied law, precedents related to current law, testimony related to current law, and an

unreliable medical report the MSPB prevented the petitioner from carrying the burden of proof by weighing evidence that was irrelevant and immaterial to this case of alleged recovery that was decided in 1978. This improper procedure resulted in tilting the scale and causing an unbalanced decision going to the heart of judgment.

If proper procedure, correct law, and all relevant evidence had been considered, the petitioner would have carried the burden of proof.

The presiding official of the MSPB hearing considered this irrelevant evidence that resulted in an erroneous decision and is evidenced by the decision, Page 6, paragraph 1 last sentence.

> "I find it appropriate to consider as probative evidence Dr. Smith's and Mr. Leismeister's testimony that the requirements of the aircraft mechanic position have changed and that accommodation or another

position is a possible alternative if appellant is unable to perform in the aircraft mechanic position as it exists today."

This statement is based on current procedure while the person is still an employee and is qualified for reassignment. The petitioner is not an employee and is not qualified for this procedure. The only allowable consideration in this case is the position last occupied as aircraft mechanic and that position cannot change to accommodate the petitioner's disability because of the nature of the job and. environmental factors involved.

DCD form 52, April, 1983, No. (1)(b), 5 CFR 831.502(g)(1) and the recovery notice, form BRI46-10, Sept. 82 under reinstatement, show that current law would apply only if the annuitant is re-employed under the retirement system and

if not, reinstatement is based on recurrence of the original disability under the original law, therefore the law in effect when the initial disability decision is made is always in effect unless the annuitant is re-employed under the retirement system, therefore application of current law by OPM and MSPB in this case is unauthorized and unconstitutional.

Disability Claims Division

REVIEW OF ALLOWED CLAIM RECONSIDERATION

Decision Summary

Case Name: Albert D. Durden

Age: 41

Agency: Air Force

Position held at retirement: Aircraft mechanic

Medical condition for which allowed:

9019 Nerve Deafness & Misc.

Case number: CSA 2050509

Allowance Date: 4-18-78

BRI 80/32 Returned_____Yes

New Medical Evidence___Yes

Date of Medical Exam_____83

For each section: circle yes or no

cite specific evidence on which decision is based

1. Yes/No Requires yes on a and b

   a. yes/no Requires yes on (1) or (2)

      (1) yes/no Annuitant answered yes on 80-32 question #1, or

      (2) yes/no Annuitant consistently engages in activities that demand the same capabilities required by previous job

   b. yes/no Medical evidence fails to prove annuitant unable to perform duties similar to position retired from (and other available positions at same level, for which qualified, if disability decision made after April 1, 1981).

2. Yes/No (Requires yes on a, b, and c)

Evidence in the file is adequate to prove:

a. yes/no Continued existence of the disabling medical condition

b. yes/no Continued non-performance of duties like those of former position because of

(1) risk of sudden or subtle incapacitation which would be likely to result in harm to self or others, or

(2) risk of health impairment caused by working, or

(3) the advanced state of the disease or injury, which makes it unreasonable to expect the person to work, or

(4) person is unable to perform duties (usually requires DCS or SMO review)

CONCLUSION

The consideration of irrelevant laws, precedents and testimony, an erroneous medical report, false testimony, a preconceived verdict of guilty and the failure by OPM to medically re-evaluate the petitioner's disabling head injury prevented the petitioner from obtaining a fair and objective hearing and made it impossible for him to carry the burden of proof just as if he were shackled and tied.

A consideration of all relevant evidence would have shown that the petitioner carries the burden of proof by a preponderance of the material evidence.

This petition should be granted in order to stabilize the balance of justice that is guaranteed by the United States Constitution but thrown off balance in this case by the reasons stated above.

Respectfully submitted,



Albert D. Durden

(Petitioner pro se)

1840 Shaver Road

Cool, California 95614

(916)823-2480

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE

FEDERAL COURT

No. 85-639

SF831L8410337

ALBERT D. DURDEN,

Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT,

RESPONDENT.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD. This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED: AFFIRMED.

DATED October 1, 1985

ENTERED BY ORDER OF THE COURT

Francis X. Gindhart, Clerk

(Signed) Francis X. Gindhart

Clerk

ISSUED AS A MANDATE: March 19, 1986

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ALBERT D. DURDEN, Petitioner

v. No. 85-639

OFFICE OF PERSONNEL MANAGEMENT, Respondent.

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

(Signed) Francis X. Gindhart

Francis X. Gindhart

March 4, 1986

Date

cc: Albert D. Durden

Hillery A. Stern

UNITED STATES OF COURT OF APPEALS FOR THE
FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20436

Francis X. Gindhart
Clerk

Telep
633-6550
Area Code
202

Mr. Albert D. Durden
1840 Shaver Road
Cool, CA 95614

Mr. David Cohen,
Director
Commercial Litigation Branch,
Civil Division
Dept. of Justice
Washington, D.C.
20530

RE: 85-639

ALBERT D. DURDEN vs. OFFICE OF PERSONNEL MANAGEMENT

Dear Counsel:

The Court today announced its decision in the above-entitled appeal.

A copy of the Court's opinion is enclosed, and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Costs may be recovered (by Appellant or Appellee) as provided by Rule 39, Federal Rules of Appellate Procedure.

Very truly yours,

Francis X. Gindhart, Clerk

By A. Karas

Deputy Clerk

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ALBERT DURDEN,

Petitioner,

v.) Appeal No. 85-639

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

DECIDED: October 1, 1985

Before KASHIWA, SMITH and NIES, Circuit Judges.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (MSPB or Board), MSPB Docket No. SF83184103337, sustaining the Office of Personnel Management's (OPM) decision to discontinue Mr. Durden's

receipt of civil service disability retirement benefits is affirmed.

DISCUSSION

On appeal to this court, Mr. Durden is essentially asking us to reweigh the medical evidence generated in this case to determine whether it is sufficient to show he is disabled. This, however, would be an inquiry into the factual underpinnings of OPM's disability determination and is clearly beyond our scope of review. 5 USC 8347(c)(1982). See also Lindahl v. OPM, 105 S. Ct. 1620 (1985). We note that Board specifically held that Mr. Durden cannot qualify for disability benefits under either the standard in effect at the time he was first determined disabled or under the current disability standard. Thus, we need not address which standard is appropriate.

Mr. Durden's remaining contentions are without merit.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALBERT DURDEN

DOCKET NUMBER

SF831L8401337

v.

OFFICE OF PERSONNEL MANAGEMENT

(CSA 2 050 509)

DATE: 27 JUL 1984

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on May 17, 1984, and finding that it does not meet the criteria for review set forth at 5 CFR 1201.115, the Board hereby DENIES the petition. Karapinka v. Department of Energy, 6 MSPB

114, 116 (1981); Weaver v. Department of the Navy, 2 MSPB 297, 298-99 (1980).*/

*/ In the initial decision, the presiding official found that appellant failed to show that he continues to be disabled from rendering useful and efficient service in his last position as an aircraft mechanic or in any other position for which the employing agency finds him qualified. Initial Decision at 8. Because we find that appellant has not shown that he cannot perform as an aircraft mechanic, we do not reach the issue of whether he must show that he cannot perform in any other position. For the same reason, if the presiding official erred in requiring appellant to show that he cannot perform in any other position, the error did not prejudice appellant's substantive rights. Karapinka, supra.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 CFR 1201.113 (b).

The appellant may have the right to judicial review of the Board's decision pursuant to 5 USC 7703(b)(1) by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The Court of Appeals has held that the Board's decision in a disability retirement appeal under 5 USC 8347 (d)(1) is not subject to judicial review, but that decision is now under review by the Supreme Court. Lindahl v. Office of Personnel Management, 718 F.2d 391 (Fed. Cir. 1983), cert. granted, 52 U.S.L.W. 3906 (U.S. June 18, 1984) (No. 83-5954). The petition for review must be received

by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

(signed) Paula A. Latshaw

PAULA A. LATSHAW

Washington, D.C. Acting Secretary

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

ALBERT DURDEN

v. Decision No. SF8318410337

OFFICE OF PERSONNEL MANAGEMENT

DATED: May 17, 1984

INTRODUCTION

By petition filed with the San Francisco Regional Office of Merit Systems Protection Board (Board), Albert D. Durden the appellant, appealed the reconsideration decision of the Office of Personnel Management (OPM) concluding that appellant has recovered from the disability for which he received a retirement annuity in 1978. Determinations made by OPM affecting the rights or interests of an indi-

vidual in questions of disability retirement are appealable to the Board under 5 USC Sections 8347 (d) (Supp. V 1982).

BACKGROUND

Appellant is a forty-one year old man who was found to be permanently disabled from rendering useful and efficient service in his position as an Aircraft Mechanic, WG-10 with McClellan Air Force Base, California. Although appellant's original allowance decision did not include a statement of the reasons for its finding, the record contains medical documents relating to perennial allergies, tinnitus[1] or sinusitis, dizziness and a skull fracture injury in December 1977.

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1 Inflammation of the nasal mucous membrane. Blakistons Gould Medical Dictionary at 1193 (4th ed. 1979).

In response to a letter from an anonymous tipster, charging that appellant was not disabled, OPM ordered a medical re-evaluation examination with allergist, Dr. Joseph Lash, and an ear, nose and throat specialist, Walter Arute, pursuant to its authority under 5 CFR 831.502(d). Dr. Arute found a left sensory-neural hearing loss probably related to noise trauma in the past but no other manifestation of disability. He was unable to offer any medical explanation for appellant's complaint of dizziness. Dr. Arute recommended that appellant protect his ear in the presence of noise but did not restrict him from work.

Dr. Lash reported that testing had shown a very weak to moderate reaction to grasses and weeds, but not to dust, mold and epidermoids. He diagnosed appel-

lant's condition as mild allergic tinnitus and probable high frequency hearing loss in the left ear but concluded that the condition was not disabling. He opined that pollution was not a factor since appellant's complaints have continued despite a move to a higher elevation.

Based on Dr. Arute's and Dr. Lash's examinations, OPM determined that appellant had recovered. Appellant requested reconsideration of OPM's finding in a letter dated September 27, 1983. Appellant claimed that Dr. Lash had failed to consider the factors relevant to his disability. Specifically, appellant claims that he suffers from toxic chemical allergies that cause headaches, earaches, ringing ears, stuffy nose and eye sensitivity. He stated that on the job exposure to toxic chemicals, gas fumes,

solvents, vehicle exhaust, cigarette smoke, high noise levels, burning rice fields, smoke, air pollution and other hazards aggravated his condition. Appellant also claimed that a hole in his skull from a compound fracture in 1977 permanently disables him because of the potential for a sharp object to penetrate his head.

On reconsideration, OPM concluded that appellant had failed to establish a present medical condition that is incompatible with useful and efficient service in his former position. OPM stated that the evidence did not confirm an allergy to chemicals or fumes at work or other substances in sufficient quantity to cause disabling symptoms. It also opined that appellant's hearing loss and head injury could be accommodated.

LAW, ANALYSIS AND FINDINGS

The Board has held that in order to establish continuing entitlement to disability retirement, an annuitant, who is alleged by OPM to have recovered from his disability, bears the burden by a preponderance of evidence. Prestien v. Office of Personnel Management, 8 MSPB 345 (1981). The ultimate determination of disability is to be based on the probative value of all the evidence, taking into account 1) objective clinical, 2) diagnoses and expert medical opinion and 3) subjective evidence of pain and disability together with 4) all evidence relating to the effect of appellant's condition upon his ability to perform in the grade or class of position last occupied. Id. at 350.

In support of his continuing disability, appellant submitted a letter from Dr.

Floyd Cothran who had treated appellant at the time of his original disability application and various medical documents relating to his skull fracture. Dr. Cothran assessed appellant's condition as improved vertigo due to avoidance of smog and petroleum products. He further stated that the hole in appellant's skull would preclude him from qualifying for his former position. However, since Dr. Cothran's assessment was made without benefit of a recent examination of appellant's allergic condition or expertise in the area of skull fractures, I find it entitled to little weight.

Appellant also submitted a letter from Dr. Zane R. Kime, diagnosing appellant's condition as chemical sensitivity which permanently disables him from the position of Aircraft Mechanic as described in his position description.

At the hearing which appellant requested, testimony concerning appellant's medical condition was offered by Dr. Kime and Dr. Duncan Smith, the medical officer who had disqualified appellant from his position following a fitness for duty examination in July 1977.

Dr. Kime testified that his practice is preventative medicine with a subspecialty in environmental medicine, particularly in the area of chemical toxicity. He testified that appellant first consulted him in October 1983 for an evaluation of headaches, dizziness and allergic conditions. Dr. Kime reported that appellant claimed that he had been on disability for a number of years because of a reaction to chemicals; that his job had required him to be around toxic vapors, hydrocarbons, fuels, chemicals, etc. and that he becomes dizzy when exposed to

chemicals and other pollutants. The evidence of record, however, does not particularly corroborate appellant's explanation of his symptoms, Dr. Kime undertook tests to determine if appellant was a type who was chemically sensitive.

He found that appellant did react with increased symptoms to a number of environmental chemicals and concluded that appellant was chemically sensitive and therefore disabled. Since medical doctors base their diagnosis at least in part on the patients subjective complaints, it is possible that in the instant case, Dr. Kime was misled by appellant's description.

While Dr. Kime's credentials as a physician specializing in environmental testimony are not disputed, I nevertheless conclude that Dr. Kime's testimony is of marginal probative value for

several additional reasons. Dr. Kime testified that the testing method he used was a "rough" method for determining chemical toxicity, and that, to be accurate, appellant would have to have been tested in a hermertically sealed room. Dr. Kime also testified that he did not know what chemicals appellant was exposed to in the work place, so he had simply tested appellant with a variety of pollutants and chemicals. Dr. Kime admitted however, that it is not possible to say a person is sensitive to a particular chemical unless the person is tested with that chemical. He stated that a person who is sensitive to one chemical may react to others, but that this is not always the case. He further stated that he was merely trying to give some evidence of chemical sensitivity. The Board, however, requires a preponderance

of evidence. Dr. Kime testified that he also tested appellant's level of B cell lymphocytes and found them somewhat lower than normal. He stated that noxious chemicals can cause this condition, but that other factors can cause the condition as well.

As I have already discussed the evidence of record, at best, only marginally supports appellant's claim that he was disabled because of an adverse dizziness reaction to chemicals at the work place. My review of the record compiled in conjunction with appellant's original disability application shows that appellant complained of dizziness for at least 10 years and that a diagnosis of his symptoms as hypoglycemia preceded his employment with McClellan Air Force Base during the time he was with the National Guard in Georgia in 1964-1965.

In 1977, Dr. C.C. Henriques reported that he had examined appellant the preceding year for a stuffy nose, headaches and dizziness which had begun in 1963 in Georgia, but which had improved in California. At that time, appellant complained tnat his symptoms were aggravated by lawn mowing, alfalfa hay, leaves, mildew, house dust and tobacco smoke particularly during the summer months. In another report by Dr. Fernando, appellant was reported to have complained of dizziness and headache after drinking coffee with sugar. In 1977, appellant stated that his symptoms had become worse one and one half to two years before, a time before his assignment to the fuel tank work which he now claims was the cause of his disability. Dr. Cothran reported in the Physicians Statement

submitted to OPM that an allergic condition had been confirmed and that the condition had worsened with work in the fuel tanks. In a brief letter, Dr. Cothran later stated that he was convinced that pollution including the burning of rice fields, aggravated appellant's condition and recommended a move to an altitude of 2,500-3,000 feet. It was not until after Dr. Smith disqualified appellant from duty because "his rather diffuse non-specific allergies... must...exclude him for his own safety from fumes, smoke, gases, dust and solvent" that appellant asserted claims that these factors caused his symptoms.

Dr. Smith was called to testify at the hearing as a witness for appellant, and it is apparent from counsel's arguments that appellant rests his claim of continuing disability in part on Dr. Smith's

statement that he saw no reason to change his former opinion from the testimony he had heard at the hearing.

Nevertheless, in reviewing Dr. Smith's report from 1977 and his testimony at the hearing, I do not analyze this evidence in the same way in which appellant's counsel apparently does. In the report Dr. Smith found appellant not fit for duty. However, he adds in his summary that

> "the documentation of total permanent disability with respect to the documentation is lacking in substantial materials, and is deemed to be borderline at best. The medical problems with respect to his loss of balance and also his allergies appear to (be) largely subjective in nature. In addition, there is still an unanswered problem as to whether the patient's difficulties with regard to his balance and allergies may well have originated prior to the first entry into the present position."

At the hearing, Dr. Smitn repeated his original observation that appellant ha

problems prior to entering the position from which he was disqualified and that his symptoms were subjective in nature. He pointed out that in the absence of the cover page to his 1977 report, he could not state whether he had recommended disability retirement, thus alluding to the Board's holding that an appellant may be found unable to perform the requirements of his position but still not qualify for disability. See Basinger v. OPM, 5 MSPB 210 (1981).

As to appellant's continuing inability to perform the duties of his position, Dr. Smith stated that he was not in a position to render an opinion in the absence of a physical. Nevertheless, he did state that working as an Aircraft Mechanic today is very different. He opined that appellant's head defect would not bar appellant from the job and that

appellant was overly concerned about it. He did, however, indicate that the hearing requirements for an Aircraft Mechanic are now stringent and that appellant's partial hearing loss might be a problem.

Mr. Leismeister, a staff specialist for McClellan, testified about the present requirements of the Aircraft Mechanic position. He stated that today the work is done in large bays (or hangars) and that WG-10 mechanic, appellant's last position, no longer works in fuel tanks. Mr. Leismeister also testified that a concerted effort is now made to accommodate any physical restrictions on employees and that under the post 1978 regulations concerning reassignment, a more in depth search is made for other positions throughout the entire facility. He opined there were numerous jobs available for which appellant could qualify if he

did not meet the requirements for the Aircraft Mechanic position.

At the hearing, both parties were asked to submit post hearing briefs on the issue of whether changes in the position requirements and regulations relating to accommodation and reassignment could be used as evidence. While both parties submitted arguments on the issue, neither side pointed to any Board precedent. In my own research, I find the Board cases of Sullivan v. OPM, 6 MSPB 636 (1981), Bagian v. OPM, MSPB Docket #PH831L8110212 (January 18, 1982) and the 9th Circuit decision in the case of Parodi v. MSPB and OPM, No. 80-7671 slip op. (9th Cir. April 13, 1982)[1] applicable. In all

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[1] While a decision of the 9th Circuit Court of Appeals is not binding on the Board, I, nevertheless, find it a useful guide in the absence of Board precedent.

three cases, an employee sought disability because of environmental factors. In two cases, the Board held that the determination is to be based on the probative value of all of the evidence. In Bagian, the Board held that because the work place air quality could be improved, the appellant was not disabled. In Parodi, the court held that if the employer could offer appellant suitable employment at the same grade or position or could accommodate the appellant's environmental limitation, appellant was not disabled. Since the Board and Court in these cases considered all evidence including work place environment, I find it appropriate to consider as probative evidence Dr. Smith and Mr. Leismeister's testimony that the requirements of the Aircraft Mechanic position have changed and the Accommodation or another position is a

possible alternative if appellant is unable to perform in the Aircraft Mechanic position as it exists today.

In his own testimony, appellant admitted that his condition had improved since leaving his job and moving to Cool, California, a rural community. Appellant, nevertheless, maintains that he is still disabled and that his symptoms would recur if he returned to the work place. He insists that it is only because he moved to an isolated area at a higher elevation away from Sacramento Valley pollution and chemicals as recommended by Dr. Cothran, that his symptoms have subsided. I find appellant's contentions in this regard less than credible. Dr. Cothran recommended that appellant's symptoms would subside if he moved to an elevation of 2,500 - 3,000 feet.

Appellant however, only moved to a community approximately 1,500 feet above sea level. Nevertheless, he contends that his condition did improve. Appellant opined that this was because Cool was rural and isolated. Yet, appellant also testified that his former residence was in a small spread out community and that Cool was approximately 8 miles from Auburn, a community on a major highway with a sizeable population. Moreover, appellant contends his symptoms have improved even though he lives and does outside chores on a small farm in the midst of grasses which were found to be substances to which he has an allergic reaction. Appellant also claimed that burning rice fields were a factor in his disability. I note, however, that appellant's adverse experience with burning

rice fields occurred in Woodland, California many miles from his work place and Loomis, California, his home in 1978.

A major factor in Dr. Smith's determination that appellant could not perform the duties of his position and OPM's decision allowing disability was appellant's claim that substances to which he was exposed made him dizzy. As I have already indicated, the record shows that appellant complained of dizziness for many years prior to being assigned to his last position as Aircraft Mechanic and he at different periods of time identified different substances as the cause of the condition. Appellant has maintained that he was and is unable to perform the duties of an Aircraft Mechanic because he must climb on the craft and might fall when he experiences dizziness. Yet, Carolee Weber who has been a neighbor and

friend of appellant for many years and who was subpoenaed to testify at the hearing by OPM, testified that appellant had fixed the roof of her trailer, helped with an addition to her house and built a barn for himself, all of which required him to climb. Ms. Weber also testified that she had never heard appellant complain of dizziness although she had heard him say he was not feeling well and that he had a reaction to sugar.

Samuel Wauchope, another friend of appellant, testified on behalf of appellant. He testified that appellant had told him he could not do sheetrock work on Mr. Wauchope's ceiling. Mr. Wauchope, however, was unable to testify with certainty at to what appellant's reason had been, although he speculated that it may have been because the ceiling was too high.

The basis for appellant's claim of dizziness has never been medically diagnosed except through Dr. Kime's rough test which I have found to be of marginal probative value. Dr. Smith described appellant's dizziness as subjective. While an appellant claims that on two occasions he nearly fell from an aircraft because of dizziness, I note that appellant never actually fell although that would be a reasonable expectation for a person working in a high place on a slippery surface. I also can find no evidence that anyone, co-worker or acquaintance, has ever observed appellant acting as if he were dizzy. Moreover, appellant admitted at the hearing that he has never stopped driving a car even though his claims of dizziness would suggest that such a precaution was warranted, and by failing to do so, he

certainly placed himself and others in a dangerous situation if he, in fact was dizzy.

I have already found Dr. Cothran's opinion that the small hole in appellant's skull resulting from a depressed fracture in 1977 would preclude him from working is entitled to little weight. Dr. Smith opined that the hole would not prevent appellant from performing the duties of his position, and that appellant was overly concerned about the risk of an object penetrating his brain. Appellant himself admitted that he only occasionally wore a hard hat to protect his head despite working and climbing around farm equipment and construction materials. He also admitted that even when working in the cramped aircraft fuel tanks (a job which is no longer part of the duties of his last position), he had

never struck his head with sufficient severity to break the skin. Therefore, the claim that appellant's skull hole is a disability condition is extremely speculative.

Having carefully reviewed and weighed the evidence of record,[2] and the testimony of the witnesses in this case, I conclude that appellant has failed to

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[2]While OPM's reevaluation of appellant's disability was undertaken because of information provided by an anonymous tipster, I have not considered the charges made by the tipster concerning appellant's disability. In addition, with regard to the tipster's charge that appellant was working for pay while receiving disability, I have found no evidence to support that charge.

meet his burden of showing he continues to be disabled from rendering useful and efficient service in his last position as an Aircraft Mechanic or in any other position for which the employing agency finds him qualified. 5 C.F.R. Section 831 502 (F)(1).

DECISION

OPM's reconsideration decision is **affirmed.**

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing an original and one copy of a petition for review with the Secretary, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington D.C. 20419, in accordance with 5 CFR Section 1201.114 and .115. The petition for review must be filed on or before

June 21, 1984 and must set forth objections fo the initial decision, supported by references to applicable laws, regulations, and the record.

This initial decision will become a final decision of the Board on June 21, 1984, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. Sections 1201.113 and .117.

The final decision of the Board in an appeal from a denial of an employee-initiated application for disability retirement benefits is not subject to judicial review under 5 USC Section 7703. Lindahl v. Office of Personnel Management, Appeal No,. 39-81 (Fed. Cir. September 22, 1983).

Any party seeking enforcement of a final decision must file a petition for

enforcement with this office in accordance with 5 CFR Section 1201.181.

The United States Court of Appeals for the Federal Circuit has held that the Board lacks authority to consider an attorney fees request for payment of attorney fees in an employee-initiated voluntary application for retirement benefits. Williams v. Office of Personnel Management, Appeal No. 83-789 (Fed. Cir. October 14, 1983).

FOR THE BOARD: Gretchen W. Thomas
Presiding Official

UNITED STATES

OFFICE OF PERSONNEL MANAGEMENT

RETIREMENT AND INSURANCE PROGRAMS

WASHINGTON, D.C. 20415

SEP 16 1983

Albert D. Durden
1840 Shaver Road
Cool, California 95614

CLAIM NUMBER
CSA 2 050 509
CORRESPONDENCE
CODE: CDC/MAW

RECOVERY FROM DISABILITY

1 DATE OF EXAMINATION-DISABILITY RECOVERY

8/25/83

2 DATE DISABILITY ANNUITY STOPS:

8/25/84

3 IF NOT REEMPLOYED UNDER CIVIL SERVICE RETIREMENT SYSTEM, YOU ARE ENTITLED TO ANNUITY CHECKED BELOW: A. X DEFERRED NON-DISABILITY BEGINS: 10/9/2004

B. IMMEDIATE NON-DISABILITY BEGINS:

A medical examination (See No. 1, above) shows you are no longer disabled under the Civil Service Retirement law.

Your disability annuity will continue to the date in No. 2 above, unless the Government reemploys you before then. If you are reemployed, the annuity must stop on the earlier date of reemployment. Tell us at once if your Government reemployment date is before the date in No. 2.

If you are not reemployed under the Civil Service Retirement System, you are entitled (because of age and length of service) to an annuity shown in No. 3 above. If the same total disability recurs, you may again qualify for disability annuity. (IMPORTANT: See the back of this letter!)

If you qualify for deferred annuity, contact this office, or any regional office of the Office of Personnel Management, for an application about 60 days before you reach age 62. If you qualify for immediate annuity, we will send an application about 30 days before it is scheduled to begin. If total disability recurs, it is up to you to contact us. (See the back of this letter.)

You may appeal any action affecting your retirement rights. If you feel our finding is improper, you may request reconsideration of this decision within 30 days of the date of this notice.

ONLY THOSE ITEMS CHECKED BELOW ALSO APPLY TO YOU

FEDERAL EMPLOYEES GROUP LIFE INSURANCE

__ NO, you are not covered!

__ YES, and coverage will continue when you file the application we will send you.

X YES, but coverage will end when disability annuity stops. There is no right to convert to an individual policy.

GROUP HEALTH BENEFITS ENROLLMENT

__ NO, you are not enrolled!

YES, and enrollment will continue when you file the application we will send you.

X YES, but enrollment will end when disability annuity stops. Then you have right to convert to a direct-pay contract.

Annuitant Services BR1 46-10

ENCLOSURES Rev. Sept., 1982

REEMPLOYMENT RIGHTS OF RECOVERED DISABILITY ANNUITANTS

This letter, stating you are no longer totally disabled according to the Civil Service retirement law, is evidence of your reemployment eligibility in the Federal Government.

As a disability annuitant, you may be entitled to placement assistance under the Displaced Employee Program. The Displaced Employee Program provides placement assistance to present or former career or career-conditional employees and certain excepted employees who have competitive status. You must apply for such assistance by completing and filing a Standard Form 171, Personnel Qualifications Statement, with your former employing agency. The employing office will then assist you in completing the necessary registration forms. If your

agency no longer exists or cannot help you, you may apply with the Office of Personnel Management Regional or Area Office closest to you. You may apply for placement assistance at any time, but not later than 90 days after your annuity stops.

REINSTATEMENT OF YOUR DISABILITY ANNUITY

If you again suffer the same disability for which you retired, your disability annuity may be reinstated. The annuity is effective with the date of a current medical examination showing you are disabled, provided you have not then reached age 62. Government reemployment outside of the Civil Service Retirement System will not bar reinstatement of your annuity, but will delay payment of the reinstated benefit until that employment ends. Reinstatement does not restore life insurance or health benefits

coverage already ended. If you are reemployed under the Retirement System, annuity rights will be determined under the law in effect when you are separated from the reemployment.

If, in the future, you meet the conditions for reinstatement, ask us what evidence is required. Even if you are receiving an immediate non-disability annuity, the disability annuity will be substituted for it unless you choose to keep the non-disability annuity.

United States

Office of Personnel Management

Washington, D.C. 20415

In Reply Refer To:

CSA 2 050 509

DEC 13 1983

Albert D. Durden

Star RT 2 Box 2661

Cool, CA 95614

Dear Mr. Durden:

This is in response to your letter requesting reconsideration of OPM's determination of your medical recovery from disability. The medical documentation in your file includes a medical examination showing that you are no longer disabled for useful and efficient service under 5 CFR 831.502(d).

The burden of proof is placed on the annuitant to demonstrate his or her

continuing entitlement for disability retirement benefits. The Disability Claims Division renders a determination of whether or not a particular disability contirues by taking into account: (1) objective clinical findings; (2) diagnosis and expert medical opinions; (3) subjective evidence of pain and disability; together with (4) all evidence relating to the effect that the annuitant's condition would have upon his ability to perform in the position last occupied.

DISCUSSION

In your request for reconsideration of our medical recovery finding you stated that you suffer from toxic chemical allergies that cause dizziness, headaches, earaches, ringing ears, stuffy nose and eye sensitivity. You implied that this condition is permanent and is

incompatible with working on your previous job as Aircraft Mechanic because of exposure to toxic chemicals, fumes, air pollution and noise. You also said that as a result of surgery for a compound depressed skull fracture you would be risking injury to the weakened area of the fracture from sharp, protruding objects in the course of performing aircraft mechanic duty.

As you know, we recently had you examined by Dr. Walter Arute, a Board certified ear, nose and throat specialist and by Dr. Joseph Lash, a Board certified specialist in allergy and clinical immunology.

Dr. Arute notes that your complaints of dizziness and vertigo are long standing and that they have not bothered you enough to prevent you from driving your car and getting around. He noted that

you do have some high frequency hearing loss in the left ear, but stated that he found nothing to account for the vertigo or dizziness. He suggested ear protection to prevent further hearing loss. We believe this could be accommodated in your previous work environment.

Dr. Lash concluded that you have a mild allergic rhinitis related to certain plants affecting primarily the nose, which is not compatible with your recurrent complaints of dizziness. He said that your condition would not disable you in the capacity as aircraft mechanic or fighter aircraft. (We had sent both doctors a copy of your job description.) None of the documentation in your file, including the reports you submitted from Dr. Cothran and Dr. Kime, confirm that you are actually allergic to the chemicals and fumes where you worked or that

such substances were present in sufficient quantity to cause you disabling symptoms. It is noted that you were required to wear a respirator in your job. Therefore, we conclude that continued restriction from the worksite is not warranted by your mild allergy.

Regarding your status post head injury and surgery, we believe that you could be accommodated on the aircraft mechanic job by wearing protective head gear.

In summary, the documentation submitted fails to establish that you now have a medical condition that is incompatible with useful and efficient service in your former position.

DECISION

As a result of reviewing the information in your file, we have again concluded that you have recovered from your disability. The original decision to

find you recovered is therefore sustained. This is our final decision. This decision may be appealed to the Merit Systems Protection Board. It must be appealed within 20 calendar days from the day which it is received.

Should you wish to initiate an appeal of this decision, mail it directly to:

1-415-974-9703
Regional Director
Merit System Protection Board
San Francisco Regional Office
525 Market Street, Room 2400
San Francisco, CA 94105

Sincerely yours,

Lorraine E. Dettman, Chief
Reconsideration Branch
Disability Claims Division

(2)

Supreme Court, U.S.
FILED
JUL 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1960

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALBERT D. DURDEN, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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5 U.S.C. (& Supp. II) 8337(a) 3

5 U.S.C. 8347(c) 2

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1960

ALBERT D. DURDEN, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the Merit Systems Protection Board (MSPB) erroneously determined that he was no longer entitled to civil service disability benefits.

1. In 1978, the Office of Personnel Management (OPM) granted petitioner, a former aircraft mechanic employed at McClellan Air Force Base in California, civil service disability retirement benefits (Pet. App. 16).[1] Upon reexamining petitioner in 1983, OPM found, however, that he was no longer disabled and, accordingly, terminated those benefits (*id.* at 43-49). OPM upheld its decision upon reconsideration (*id.* at 50-55) and the MSPB affirmed (*id.* at 15-42). The MSPB presiding official found that petitioner had

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[1]References to the appendix to the petition for a writ of certiorari, which was not paginated, are based on our consecutive numbering of the pages.

failed to prove by a preponderance of the evidence that he was unable to render useful and efficient service either in his last position (the disability standard in effect when OPM initially found that petitioner was disabled) or in any other position for which the employing agency found him qualified (the disability standard in effect when OPM found that petitioner was no longer disabled). *Id.* at 39-40. The MSPB subsequently declined petitioner's request that it review the presiding official's decision (*id.* at 11-14). The MSPB noted that because petitioner had not shown that he was unable to render useful and efficient service in his last position as an aircraft mechanic, the MSPB did not need to consider whether "the presiding official erred in requiring [petitioner] to show that he cannot perform in any other position" (*id.* at 12 n.*).

The court of appeals affirmed (Pet. App. 1-2, 8-10). The court stressed that petitioner sought, in effect, a reweighing of the medical evidence, which was "clearly beyond [the applicable] scope of [judicial] review" (*id.* at 9, citing 5 U.S.C. 8347(c); *Lindahl* v. *OPM*, No. 83-5954 (Mar. 20, 1985)). The court also noted that because petitioner could not qualify for benefits under either disability standard, the court did not need to determine whether the current or the former disability standard should apply (Pet. App. 9).

2. The decision of the court of appeals is correct and presents no conflict with any decision of this Court. Further review is not warranted.

Petitioner contends (Pet. 24-31) that the MSPB's determination suffers from procedural errors going to the heart of the administrative process and, therefore, is subject to judicial review pursuant to this Court's decision in *Lindahl*. Petitioner's objections, however, are entirely factbound, concerning only the weight given by the MSPB to various medical reports on petitioner's ability, and present no such

fundamental procedural errors. Petitioner's complaint is that the MSPB's disability determination was based upon an invalid and unreliable medical report and perjured testimony and is contrary to three valid medical reports. The court of appeals' conclusion that it lacked authority to review these issues is entirely consistent with this Court's decision in *Lindahl* that Congress intended to preclude judicial review of "the factual underpinnings of [the MSPB's] disability determinations" (slip op. 21). See also *McEachern* v. *OPM*, 776 F.2d 1539, 1545 (Fed. Cir. 1985) (court cannot substitute its judgment on medical evidence for the determination made by the MSPB). In any event, such factual disputes are plainly best resolved by the administrative entity that hears the evidence in the first instance (cf. *Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985), slip op. 8-10; *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 21-22), and their resolution in a particular case presents no important legal issue warranting this Court's review.

Petitioner also maintains (Pet. 34-42) that the court of appeals erred in finding it unnecessary to decide which of two possible disability standards applied in this case: the determination of disability under current law or the definition in force at the time of OPM's initial disability determination. Under current law, an employee must prove that he is unable to perform the duties both of the position last occupied and of other positions for which the agency determines the employee is qualified (5 U.S.C. (& Supp. II) 8337(a)). When OPM initially determined that petitioner was disabled, the applicable standard required proof only of the employee's inability to perform the duties of the position last occupied. See *Cerrano* v. *Fleishman*, 339 F.2d 929, 931 (2d Cir. 1964), cert. denied, 382 U.S. 855 (1965).

Petitioner cannot, however, complain of unfair treatment on the ground that the current standard is more restrictive. Although the MSPB presiding official applied

the current standard in this case (Pet. App. 40), the MSPB concluded that it was not necessary to decide which definition applied to petitioner because he did not meet either standard (*id.* at 12 n.*). For this reason, the MSPB concluded, even if the presiding official applied the incorrect standard, any error was harmless. The court of appeals expressly approved the MSPB's conclusion on this basis (*id.* at 9).

Finally, petitioner contends (Pet. 12-13) that he was denied benefits based on accusations that he committed criminal acts and that he is entitled to know both the identity of his accuser and the charges against him. These contentions are without merit. OPM denied petitioner benefits based on the medical evidence and other evidence set out in the record. No criminal proceedings are involved in this purely administrative matter.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986